



Commonwealth of Massachusetts State Ethics Commission

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SUFFOLK, ss.

**COMMISSION ADJUDICATORY
DOCKET NO. 612**

**IN THE MATTER
OF
DAVID L. PHINNEY**

DISPOSITION AGREEMENT

This Disposition Agreement is entered into between the State Ethics Commission and David L. Phinney pursuant to Section 5 of the Commission's Enforcement Procedures. This agreement constitutes a consented-to order enforceable in the Superior Court, pursuant to G.L. c. 268B, §4(j).

On December 15, 1999, the Commission initiated, pursuant to G.L. c. 268A, §4(a), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by Phinney. The Commission has concluded its inquiry and, on September 19, 2000, found reasonable cause to believe that Phinney violated G.L. c. 268A.

The Commission and Phinney now agree to the following findings of fact and conclusions of law:

I

1. Phinney worked as a construction specialist for the City of Boston Public Facilities Department ("BPFD") from 1988 to October 31, 1997. As such, Phinney was a municipal employee as that term is defined in G.L. c. 268A, §1. Phinney's municipal position was full-time and salaried.

2. As part of his duties and responsibilities as a BPFD construction specialist, Phinney monitored the status and progress of housing rehabilitation projects done under contract with the BPFD. Phinney regularly visited project sites and performed inspections. In addition, as a construction specialist, Phinney received payment requisition forms from the contractors, reviewed the forms and signed his approval on the forms when warranted. Phinney's signature on the form signified that he had inspected the project site and confirmed that the work for which payment was being requested had in fact been performed by the contractor in a good and workmanlike manner.

II

3. Patrick Oser is a building contractor. During the period here relevant, Oser did business as Oser Builders and as The Oser Corporation. ("Oser," as hereinafter used, means and refers to Patrick Oser, Oser Builders and/or The Oser Corporation.)

4. In 1994 and 1995, the BPFD awarded Oser contracts to renovate four buildings in Boston. The BPFD contracts provided that Oser would receive construction and subsidy loans from the BPFD to acquire and renovate the properties for resale to first-time home buyers.

5. Pursuant to the BPFDD contracts, Oser was required to submit requisitions to the BPFDD as construction proceeded, requesting payment from the loan funds for “hard” costs (e.g., construction labor and materials) and “soft” costs (e.g., insurance and other overhead).
6. Shortly after Oser received the first BPFDD contract, Phinney and Oser entered into an arrangement pursuant to which Oser would pay Phinney to prepare the parts of Oser’s requisitions to the BPFDD requesting payment for hard costs. Phinney requested and Oser agreed to pay Phinney between \$250 and \$400 per requisition.
7. Between September 1994 and October 1996, Phinney prepared for Oser the hard costs portions of approximately twenty-three requisitions for payment by the BPFDD.
8. After Phinney prepared the hard costs sections of each of Oser’s requisitions, he signed each as a BPFDD construction specialist certifying that he had, in his official capacity, inspected the work required for the payment and found it to have been performed in a good and workmanlike manner. In so doing, Phinney, as a BPFDD construction specialist, approved the hard costs portion of each Oser requisition for payment by the BPFDD.
9. After privately preparing, and in his official capacity approving, the hard costs portions of the requisitions, Phinney gave them to Oser. Oser then prepared the portions of the requisitions relating to soft costs, and submitted the complete requisitions to the BPFDD for payment. Pursuant to the requisitions, Oser was paid a total of more than \$500,000. Oser, in turn, paid Phinney a total of approximately \$5,000 for preparing the hard cost portions of the requisitions.
10. In 1995, in addition to preparing the hard costs portions of BPFDD payment requisitions for Oser, Phinney was hired by Oser to do construction management work in connection with a home renovation in South Weymouth. Oser paid Phinney over \$3,000 for this non-BPFDD related work.
11. Phinney did not disclose any of his private work for Oser to his appointing authority.

III

12. Long & Gordon is a real estate development company. In 1996 and 1997, Long & Gordon had three contracts with the BPFDD relating to the rehabilitation of several buildings in Boston. Phinney acted as the BPFDD construction specialist on each of these projects, inspecting the progress of the work and reviewing and approving Long & Gordon’s BPFDD payment requisitions as to hard costs.
13. In late 1996, Long & Gordon hired Phinney as a part-time, private consultant to review subcontractor bids and to perform cost analysis on company projects that did not involve the BPFDD or the City of Boston. Phinney did not prepare any Long & Gordon requisitions or parts thereof for submission to the BPFDD.
14. Phinney worked as a private consultant for Long & Gordon from October 1996 through June 1997. Long & Gordon paid Phinney \$5,000 for this work.
15. Phinney did not disclose any of his private work for Long & Gordon to his appointing authority.

IV

16. Phinney resigned from the BPFDD in late October 1997, when his private dealings with Oser and Long & Gordon first became known to his BPFDD superiors.

17. Phinney fully cooperated with the Commission's investigation of this matter.

V

18. Section 17(a) of G.L. c. 268A, prohibits a municipal employee from, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receiving or requesting compensation from anyone other than the municipality or an agency thereof in relation to any particular matter in which the municipality is a party or has a direct and substantial interest.

19. Each decision by or on behalf of the BPFDD to approve Oser's requisitions for payment was a particular matter.^{1/}

20. The City of Boston had direct and substantial interests in the BPFDD's decisions to approve Oser's requisitions for payment.

21. Thus, each time that Phinney requested or received payment from Oser for helping to prepare Oser's payment requisitions to the BPFDD, Phinney requested or received compensation from a party other than the City of Boston or a Boston municipal agency in relation to a particular matter in which the City of Boston had a direct and substantial interest. The compensation that Phinney requested and received from Oser was not as provided by law for the proper discharge of Phinney's official duties as a construction specialist. Therefore, each time Phinney requested or received compensation from Oser for helping to prepare the BPFDD requisitions, he violated §17(a).

22. Section 19 of G.L. c. 268A prohibits a municipal employee from participating as such an employee in a particular matter in which, to his knowledge, he has a financial interest.

23. Phinney participated as a municipal employee in the particular matters of the BPFDD's decisions to approve Oser's payment requisitions by personally approving the hard costs portions of the requisitions in his official capacity as a BPFDD construction specialist.^{2/}

24. If the requisitions that Phinney had helped Oser prepare had been rejected by the BPFDD and not been paid, Oser would likely have terminated the private arrangement with Phinney. Thus, Phinney had a financial interest in the BPFDD's approval of the Oser requisitions.^{3/} Phinney knew of his financial interest in the BPFDD's approval of the Oser requisitions at the time that he approved the hard costs portions of them as a BPFDD construction specialist.

25. Therefore, each time that Phinney, as a BPFDD construction specialist, approved the hard costs portions of an Oser payment requisition that he had prepared, Phinney participated in a particular matter in which, to his knowledge, he had a financial interest. Each time that he did so, Phinney violated §19.

26. Section 23(b)(3) of G.L. c. 268A, prohibits a municipal employee from, knowingly or with reason to know, acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as the result of the undue influence of any person or party. Section 23(b)(3) further provides that "[i]t shall be unreasonable to so conclude if [the employee] has disclosed in writing to his appointing authority ... the facts which would otherwise lead to such a conclusion."

27. A reasonable person, with knowledge of the above-stated circumstances, would conclude from Phinney's approval of Oser's requisitions as to hard costs, contemporaneously with his private paid BPFDD

requisition preparation and South Weymouth project administrative work for Oser, that Oser could improperly influence Phinney or unduly enjoy his favor in the performance of his official duties as a BPDFD construction specialist. Accordingly, by contemporaneously working privately for Oser and approving, as a BPDFD construction specialist, Oser's payment requisitions as to hard costs, Phinney violated §23(b)(3). Phinney at no time made the disclosure to his appointing authority required to avoid violating §23(b)(3).

28. Finally, a reasonable person, with knowledge of the above-stated circumstances, would conclude from Phinney's approval of Long & Gordon's requisitions as to hard costs, contemporaneously with his private paid consulting arrangement with the company, that Long & Gordon could improperly influence Phinney or unduly enjoy his favor in the performance of his official duties as BPDFD construction specialist. Accordingly, by contemporaneously working as a paid private consultant for Long & Gordon and, as a BPDFD construction specialist, approving the company's payment requisitions as to hard costs, Phinney violated §23(b)(3). Phinney at no time made the disclosure to his appointing authority required to avoid violating §23(b)(3).

VI

In view of the foregoing violations of G.L. c. 268A by Phinney, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings, on the basis of the following terms and conditions agreed to by Phinney:

(1) that Phinney pay to the Commission the sum of \$8,500 as a civil penalty for violating G.L. c. 268A;

(2) that Phinney pay to the Commission the sum of \$5,000 as a civil forfeiture of the compensation he received for preparing requisitions submitted to the BPDFD in violation of G.L. c. 268A, §17(a); and

(3) that Phinney waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this agreement in this or any other related administrative or judicial proceeding to which the Commission is or may be a party.

DATE: February 8, 2001

¹"Particular matter" means any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

²"Participate" means to participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, §1(j).

³"Financial interest" means any economic interest of a particular individual that is not shared with a substantial segment of the population of the municipality. See *Graham v. McGrail*, 370 Mass. 133, 345 N.E. 2d 888 (1976). This definition has embraced private interests, no matter how small, which are direct, immediate or reasonably foreseeable. See *EC-COI-84-98*. The interest can be affected in either a positive or negative way. See *EC-COI-84-96*.